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No. 270

In the Supreme Court of the United States

October Term, 1952.

Kobe, Inc., a corporation, and Alta Vista Hydraulic Company, Ltd., a corporation, *Petitioners,*

vs.

Dempsey Pump Company, a corporation, Oscar E. Dempsey, Specialty Sales and Service, Inc., a corporation, and M. L. Walraven, Jr., *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

In opposition to the petition respondents respectfully pray that review be denied to petitioners. Their brief in opposition follows.

Opinions Below.

The District Court filed no written opinion. Its findings are reported at 97 F. Supp. 342, and are found at pages 133 through 158 of the printed record. Oral comments of the trial court respecting its judgment are found at pages 660 through 669, and at pages 880 through 892 of the record.

The opinion of the Court of Appeals (R. 1317-1342) is reported at .... F. (2d) ...., and is published at 94 U. S. Patent Quarterly 43, Advance Sheet of July 19, 1952.

Jurisdiction.

Judgment of the Court of Appeals affirming the District Court was entered on July 5, 1952 (R. 1342), and petition for certiorari was filed on August 12, 1952. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1) relating to review by the writ of certiorari.

Questions Urged by Petitioners.

Respondents respectfully object that the questions urged by petitioners for review do not arise upon the facts found and affirmed below. As is disclosed by the opinion of the Court of Appeals (R. 1317-1342), and by the findings entered by the trial court (R. 133-158), the judgment affirmed below rests upon facts which are vastly more provocative than is disclosed in petitioners' "questions" or in their statement of the case.

With respect to question numbered 1, we urge that neither of the lower courts placed its judgment of guilt against petitioners upon "mere acquisition" of patents coupled with an infringement action without patent misuse. The question posed ignores the issues tendered for decision, the findings thereon, and the stated premise of the affirming opinion of the Court of Appeals.

Neither does the judgment for damages rest upon a simple claim for injuries caused solely by the good faith prosecution of an infringement action, as is presupposed by petitioners' question numbered 2. Indeed, the Court of Appeals answered petitioners' second question as petitioners desire (R. 1331, 1332), but pointed out that the issues were framed upon a broader picture in which the legal action was but a significant part of a planned intentional wrong compensable under the Clayton Act.

As the questions posed do not fairly arise upon the issues joined and the judgments entered below, and as the statement of the case contained in the petition is incomplete in respects found by the lower courts to be significant and even controlling, we have no alternative but to restate the case as it was presented below.

Following our restatement, we shall attempt to restate the "questions presented" in the terms in which they actually arose, and in the terms in which they will be presented here if the case be accepted for review.

Statutes Involved.

The statutes involved are Sections 1 and 2 of the Sherman Act (Title 15, U. S. C., Sections 1 and 2), and Section 4 of the Clayton Act (Title 15, U. S. C., Section 15.)

Section 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade marks, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the Commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competi

tion under Section 45 of this title: *Provided, Further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The petition suggests that only Section 2 of the Sherman Act is involved in the case. Presumably this view is taken because both lower courts found that petitioners had achieved an actual and total monopoly of commerce and were guilty of "monopolizing" in violation of the section. But the pleadings, the evidence, and the findings all reflect a series of violations of Section 1, consisting of contracts, combinations, conspiracies and the like intended and designed to establish, maintain or continue the illegal monopoly which was successfully accomplished through their agency.

The violations of Section 1 are sufficient in themselves to sustain the injunctive relief awarded against enforcement of petitioners' patents, and very probably would sustain the award of damages, in which event the questions posed by the petition would become academic.

Statement of the Case.

The subject of controversy is hydraulic pumping equipment for lifting oil from deep wells. Commerce in such equipment is as widespread as the oil industry. Petitioner Kobe, Inc., (and its predecessor of the same name) has enjoyed a total monopoly of this commerce since 1933. Patents were involved in the case, but the principal issues turned upon petitioners' illegal engrossment of commerce, and the means by which it was accomplished. Both lower courts found the monopoly to have been intentially achieved, pursuant to deliberate plan, and to violate the Sherman Act. Both lower courts found respondents to have been injured in their business and property by acts of petitioners calculated to exclude them from competition in furtherance of the monopoly, and damages therefor were adjudged and affirmed under the Clayton Act.

Throughout the litigation petitioners have attempted to justify their admitted engrossment of the subject commerce as the fair and legal emolument of their ownership of a formidable array of patents; urging, as they do here, that the product of multiplied individual patent privilege is legal immunity from the penalties of the antitrust laws.

The case is not as simple as is indicated in the petition; for petitioners' patents were accumulated in a restricted pool, originally formed between competitors but quickly closed even to participants other than the emerging monopolist, into which were swept by contract and purchase all actually competing and potentially competitive product designs, together with many which never reached even experimental stage but which attracted the watchful eye of counsel commissioned to monitor new patent grants in the field.

The purpose of the original patent pool was frankly declared to be to build up, extend and protect a presumed "patent monopoly" in hydraulic pumps. All of the usual accompaniments of illegal monopolies are found in the record. The original agreement contained a price fixing covenant between the owners of the pool who should have been competitors. Royalties exacted by the pool burdened a commerce which far transcended the patent grants involved; the pool's principal early competitor was absorbed by purchase and a contract which effectually removed its product from the market in consideration of payments taxed against commerce in unpatended goods; and covenants were exacted of potential inventors or competitors which required them to remain out of competition and to surrender relevant future inventions and patents to the pool. Patents defining many designs of pumps were ac-

quired, but only one design was offered to the market. The remainder were held out of production and used only to "fence" the commercial product of Kobe, Inc., and latterly, to aid the attempt to drive respondents from the competitive field. By 1948, just prior to the commencement of this action, the patent fence had been fortified to an extent that the chief officer of Kobe prefaced his demand that respondents cease competition with the boast that no one could make a satisfactory hydraulic pump without infringing one or another of petitioners' patents. That this observation stated the belief of petitioners is without doubt, and that it paraphrased the intended end and purpose of the patent pool has been both found and affirmed below. Other and immediately damaging acts were focused against respondents to drive them from the competitive field, which very nearly succeeded, and resulted in the serious losses which were compensated by the judgment for damages assessed and affirmed below.

In view of the abbreviated statement of the case contained in the petition, the foregoing statements require annotation to the record. Perhaps the shortest guarantee of their integrity is found in the opinion of the Court of Appeals (R. 1317-1342) where the issues which were actually decided below are fairly stated. Nothing less than the statement contained in this opinion should be accepted as the case submitted for judgment. As the opinion is necessarily less than explicit in its reference to the record, we presume to document it with further reference to the circumstances in the proof which induced the original findings.

It should not be thought that hydraulic pumps for oil wells are new to the industry, or that they are recent in conception. The first patent for such a device was granted

in 1878,[1] and hundreds of similar patents have been granted since.[2] Presumably the first patent could legally have granted a brief monopoly upon all pumps of the type, but the basic principle and practice have long been in the public domain. Current patents are necessarily limited to narrow improvements, or to complicated combinations thought to have virtue in limited application. The art is old, and is crowded, but by the acquisition or control of more than ninety patents, granted to many inventors, petitioners attempted and intended to capture an industry,[3] and except for the judgment in this case would have succeeded.

It likewise should be understood that the commerce captured and controlled by exclusive possession of the bottom hole pumping unit itself was far greater than the mere sale of the pumping device. It is clear that sales of hydraulic pumps are almost invariably accompanied by sales of auxiliary equipment, necessary to their operation, which greatly exceed the price of the pump itself.[4] This equipment consists of the tubing, filters, surface tanks, surface compressors, and power units necessary to effect an hydraulic pumping installation.[5] During the monopoly, the experience of the petitioner Kobe, Inc., was that dollar sales of unpatented auxiliary equipment exceeded pump sales in dollars in a ratio of more than four to one.[6] It was shown that the dealer who could offer the bottom hole pumping unit was enabled to sell the much larger value of unpatented aux-

1. Faucett Patent No. 204015 was Defendants' Exhibit 7A, which is not included in the printed record, but its admission is noted at R. 604 and its date, May 21, 1878, is reflected at R. 210.
2. R. 1095, through 1098.
3. Finding 38, R. 145.
4. Findings 36, R. 144, and 60, R. 152.
5. R. 559, 560.
6. R. 897.

iliary equipment, and that one who was without the necessary bottom hole unit was effectually excluded from this commerce. The commerce at stake was substantial, amounting in the year 1948 to more than $4,000,000.00.[6]

It is true that the hydraulic or "rodless" pump was not produced commercially until about twenty years ago, when the early introductory enterprises of Scott-Ross and Company, Rodless Pump Company, Alta Vista Hydraulic Co., Ltd., Arthur G. Gage, and Kobe, Inc., were finally consolidated in the corporate predecessor of the petitioner, Kobe, Inc. But its emergence as an important article of commerce was foreseen about 1926, as the depth of oil wells increased and rotary drilling methods confronted the producer with well bores which deviated greatly from vertical.[7] Elimination of metal rods for power transmission then became of prime concern, and the hydraulic installation became both comparatively economical and in many instances virtually a necessity.[8] Manufacture and marketing of hydraulic pumps and related equipment quickly became an important corollary enterprise to the oil industry, but for more than fifteen years was the exclusive domain of petitioner Kobe, Inc., and its predecessor of the same name.[9] This was no accident, but was the result of shrewd planning to an illegal end, as the two lower courts have found,[10] and we now shall show.

The central figure in petitioners' activities was C. J. Coberly, who was president of Kobe, Inc., and of its predecessor corporation of the same name, and was the directing head of its enterprises at all relevant times. He was

7. R. 174.

8. Note Findings 31 and 32, R. 143.

9. Findings 35 and 36, R. 144.

10. Findings 38 through 55, R. 145-151.

an engineer, an inventor, and an industrialist of prominence. He saw the need of the oil industry for a "rodless" pump in 1925, and developed a design for such a pump. He secured several patents on his design.

But others than Coberly had seen the need and the potential market awaiting hydraulic pumping equipment, and were already moving to supply it. Ira B. Humphreys, of Denver, Colo., had devised an hydraulic pump which he had built and operated.[11] Humphreys had been granted two patents which Coberly regarded as of fundamental importance. Coberly tried to acquire the Humphreys patents, but was refused.[11] Roland R. Crum had designed and built a pump and had been granted a patent which he assigned to L. & B. Producing and Drilling Company.[12] Arthur G. Gage, of Los Angeles, was actively engaged in devising and producing an hydraulic pump which was the first to reach the commercial market, and which was successfully employed in the wells of major operators.[13] An engineer named Scott had designed a pump and organized a corporation to produce it, which was Scott-Ross & Company of San Francisco.[14] Each of these enterprises held patents respecting its intended product, and each was moving independently toward realization of the commercial market therefor in the years between 1926 and 1933. In this period a typical competitive development of several independent hydraulic pump designs was in prospect. But competition in the industry was not to be realized, and it died at the hand of Kobe.

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11. R. 176, 190, 211.
12. R. 210, 929, 1002.
13. R. 190, 212, 1071, 1078.
14. R. 1000, 1002.

Rodless Pump Company.

Scott-Ross and Company secured an exclusive license under the Crum patent which it added to the patents of its own engineers, Scott and Yungling. It then succeeded where Coberly had failed, and added exclusive rights under the Humphreys patents,[15] to move into a position of early dominance of the scene. By a corporate split the Scott-Ross hydraulic pump enterprise became Rodless Pump Company,[16] which is a principal figure in the events which followed. It secured additional capital, established an assembly shop, caused parts to be produced commercially for its account, and prosecuted experimental installations of its product.[16] It was experiencing financial as well as engineering difficulties when it was approached by Coberly in his first move toward consolidation of the new industry.

First Rodless-Kobe Agreement.

By the end of 1932, Coberly had progressed with his own experiments to a point where he was ready to produce a pump of his own design as a product of Kobe, Inc., which was already well established as a manufacturer of oil industry specialties. He expressed concern that his pump transgressed the claims of the Humphreys and Crum patents, and stated that he approached Rodless Pump Company to discuss claims of apparent patent conflict. The discussion resulted in a written contract between Rodless and Kobe by which the cornerstone of the Kobe monopoly was laid. The full text of the agreement is found at pages 901 through 915 of the printed record.

In capsule, the contract provided for establishment of

15. R. 915, *et seq.*

16. R. 1023-1026.

a pool of hydraulic pump patents in a new corporation which was named Roko Corporation. Rodless and Kobe were required to transfer all their pump patents to Roko, and covenanted to surrender to the pool any new relevant inventions or patents acquired in the future. Roko was directed by a board named equally by the contracting parties, and its stock was held in equal shares. Roko was committed to the immediate grant of full license under all the pooled patents to Kobe, Inc. But Rodless was to receive a similar license only if it elected to claim the same within three years.[17] It was provided that Roko might not grant any other license except by unanimous vote of directors controlled by the contracting parties.[18] Roko was authorized and required to establish a "schedule of prices and terms of payment" to govern commerce of its licensees in products covered by the license.[19] Of most revealing significance is a paragraph entitled "Plan of the Company"[20] wherein Roko is frankly dedicated to continued acquisition of patents having to do with hydraulic pumps, and is committed to "build up and maintain its patent monopoly." Such was its declared purpose, and such was its career in actual event.

Attached to the Rodless-Kobe agreement, and incorporated therein, is the form of license agreement which issued (only to Kobe) and which again is revealing of the motives of the transaction.[21] The licensee subscribed to price fixing by Roko,[22] and agreed to surrender to or procure for Roko any future relevant patent rights coming to its

17. R. 911, par. XII.
18. R. 911, par. XIV.
19. R. 912, par. XV.
20. R. 911, par. XI.
21. R. 932-943.
22. R. 939, 940, par. XII.

attention.[23] In a paragraph captioned "Further Assistance" the licensee agreed to aid Roko "in building up, extending, and protecting the established patent monopoly of licensor in and to 'Rodless Pumps'."[24]

The royalty provision of the license agreement[25] are particularly revealing. Kobe (or Rodless if it had been licensed) was required to pay into Roko 70% of its net profits arising from dealings in "rodless pumps" and auxiliary equipment as well. Thus the power of the patent pool was exerted to exact an exorbitant toll upon the much richer commerce in unpatented auxiliary equipment, which the parties then recognized to be captive to the seller who likewise could provide the pump. There is no mere license to practice the narrow inventions of an art which was approaching exhaustion. Here are several limited sanctions of many narrow patents were cumulatively employed to regiment and pre-empt a commerce which far transcended the subject matter of any patent grant.

At the signing of this agreement, both Rodless and Kobe were committed to the program of engrossment which followed. Rodless still held an option to enter competition with Kobe if it reached such a decision within three years, but this option was speedily dealt with by Kobe in a second agreement which followed in less than two years. Patents of great importance had been consolidated in the pool, and a method had been provided for its expansion to include others as they might appear. Armur G. Gage and Alta Vista Hydraulic Co., Ltd., remained outside the pool, and were in actual production of a competitive product which did not

23. R. 941, par. XIV.
24. R. 941, par. XV.
25. R. 933, par. IV.

transgress the pooled patents. Indeed, Gage and Alta Vista had their pump on the market and in the wells of important major producers. But Gage and Alta Vista were not to remain in competition with Kobe as will now appear.

Envelopment of Gage and Alta Vista.

The Gage enterprise had been developing its pump at Los Angeles since about 1924.[26] Gage had been granted a number of patents, seven of which he held individually, and three of which were assigned to Alta Vista Hydraulic Co., Ltd., a corporation owned by the Gage family. By 1933, the Gage interests had produced two pump models which had survived initial tests, and its product had entered the commercial market—doubtless the first to do so. Successful sales had been made to major producers on the Pacific Coast,[27] and the pump had been offered to producers in the mid-continent area through a licensee who had sold other installations. When it was approached for integration into the Roko pool, the Gage enterprise was still small, and was suffering financial stringencies typical of the depression period, but had already achieved the impetus which follows successful utilization of a new product by important users such as Gulf Oil Corporation and Plymouth Oil Company. It should be remembered that the Gage pump was wholly different in design from the Kobe pump, and there was no claim that its structure infringed the Roko patents.

Coberly, or Kobe, suggested to Roko the desirability of adding the Gage and Alta Vista patents to the pool.[28] This result was accomplished by two contracts executed in

26. R. 1045.
27. R. 1079.
28. R. 217.

April of 1934. By the first,[29] Roko purchased the seven patents held by Gage for a cash consideration. But this contract plainly bore the earmark of monopolistic intent, for it required Gage to covenant against engaging in any business or accepting any employment "in any way detrimental" to the business of Roko or its licensee for a period of five years.[30] Gage further was required to surrender any future inventions and patents which he might make or secure relating to rodless pumps for about ten years following the contract date.[31] Another significant provision of this contract was a covenant that neither Roko nor its licensee should be obliged to produce or market any of the devices covered by the patents assigned.[31] As the product already was on the market, the provision evinced an intention to remove it, and this is what occurred. Coberly admitted that the Gage patents were acquired without intention to produce the Gage pump,[32] and no commercial use was ever made of the patents, though a substantial sum had been paid for them.

The contract with Alta Vista[33] took the form of an exclusive license under five patents which it held. Alta Vista covenanted to grant no other license so long as the Roko license was in force, and later agreed that it would not itself engage in production under the patents.[34] The now familiar covenant to grant similar exclusive rights under future patent acquisition was included. Royalties were exacted by Alta Vista upon gross sales by Roko licensees of any and all hydraulic pumps of any design, and upon sales

29. R. 968, *et seq.*
30. R. 970.
31. R. 971.
32. R. 213.
33. R. 963-968.
34. R. 974.

of unpatented auxiliary equipment (except tubing) as well.[35] Again patents were used to exact a toll upon commerce in goods beyond the patent grant, and again an intention to abandon or eliminate the Gage product is evident. No pumps were produced under the Alta Vista license, and the only use made of the patents was in this action, wherein respondents were charged to have infringed their claims. The infringement claims were first made as the patents were about to expire, and all did expire before the case reached judgment in the trial court. All but one were held invalid, but one of the Alta Vista patents was the only patent relied on by petitioners which was held valid by the lower courts. The defensive purpose of this acquisition was plain, as the trial court found.[36]

After execution of the two contracts of April, 1934, the Gage pump was eliminated as a competitive product, the Kobe pump was "fenced" by the Gage and other patents against intrusion of a different and successful design, and all known potential competitors, except Rodless, had disappeared from the scene. But Rodless still retained an option to enter competition by claiming a license from Roko, and the elimination of this option was the next step in the Kobe career.

Second Rodless-Kobe Agreement.

On November 9, 1934, an amendment to the Rodless-Kobe agreement of 1933 was executed.[37] The material effect of this supplemental contract was that Rodless agreed that its right to be licensed under the Roko pool should be suspended so long as Kobe should continue to manufacture

35. R. 965-966.

36. Finding 38, R. 145.

37. R. 943-947.

and market hydraulic pumping equipment, in consideration of an adjustment of financial obligations to and by Roko, and a covenant by Kobe to pay 5% of its profits direct to Rodless until a stated sum was received. The price fixing provision of the original agreement was suspended so long as Kobe was sole licensee. Thus Rodless was eliminated as a possible future competitor, though it retained its stock in Roko and was entitled to share in the profits of the Kobe enterprise through the royalty provisions of the Kobe license which required division of profits in the whole hydraulic field. The Rodless interest in Roko and in the profits of the enterprise was itself eliminated in 1945, as later will appear.

Further Patent Acquisitions.

At the end of 1934 Roko held most significant current patents in the field, and all of the active potential producers of pumps had been swept into the pool. Kobe, as the sole licensee of Roko, immediately and vigorously began to exploit the commercial market for its product, offering to the trade only the Coberly design of pump. From early small beginnings Kobe's traffic in hydraulic pumping equipment increased rapidly to impressive totals, amounting to more than $4,000,000.00 in 1948,[38] the year in which this action was commenced.

But in the interim, Roko pursued its declared policy of expanding and consolidating its presumed "patent monopoly." Patent counsel for Kobe and Roko were directed to monitor patents issuing from the patent office and to report inventions which were related to the hydraulic pumping field.[39] From time to time, through counsel or directly,

38. R. 897.

39. R. 240, 241.

Roko sought out and procured exclusive rights in new inventions which were pertinent to the enterprise. In the period preceding 1945, various relevant patents were acquired from inventors named Tucker, Palm, Loewenthal, Worthington, Wray, Graffenstat, and others,[40] until Roko held a total of more than seventy patents relating to hydraulic pumps.

But Kobe's patent claims were even greater than its actual patent coverage. Its pump was widely advertised as manufactured under and protected by a total of ninety-one patents.[41] These claims were untrue, for they included many expired patents, many patents which did not even approach coverage of the Coberly pump, and others which did not cover pumps at all. These claims doubtless had their expected deterrent effect upon competition which might have arisen in a free market.

Abuses in Repair and Servicing.

Kobe was not content with its exclusive possession of the market for hydraulic pumps. It extended its exclusive control to the allied field of repair and servicing of pumping installations in the hands of purchasers, which of course was beyond the limits of any patent grant. In its early transactions, customers were required by annual contract to utilize Kobe facilities for repair and servicing of their purchases.[42] Subsequently this contracting practice was abandoned, but control of the function was still effectually reserved. Kobe refused to sell parts for its products except in connection with its own employment to effect re-

40. R. 223-226.

41. These claims were set forth in Plaintiffs' Exs. 2 and 3 which are not included in the printed record but which were before the Court of Appeals in original form.

42. R. 561.

pair.[43] Special tools were required to break down and reassemble the Kobe pump, and these Kobe refused to sell at all, but permitted their use only in Kobe shops.[43] The commerce pre-empted by these practices was not trifling, and is shown to have amounted to about a half million dollars per year in 1943 and 1944,[44] and was shown to have continued to and through the commencement of this action.

The Kobe-Dresser Merger.

Late in 1944, Dresser Industries, Inc., became interested in the Kobe enterprise. Dresser Industries is one of the great holding companies in which numerous lines of heavy oil field equipment have became concentrated. Dresser desired to integrate the Kobe enterprise in its program, and successfully proposed a plan for merger of Kobe into Dresser.[45] The plan provided for transfer of all assets of Kobe to Dresser, assumption by Dresser of all Kobe liabilities, and issuance of Dresser stock to Kobe, Inc., for distribution to its shareholders in exchange for surrender of its own stock, following which Kobe, Inc., was to dissolve. The plan was executed.

As an incident of the merger of Kobe into Dresser, the latter had acquired one-half the stock of Roko Corporation. Dresser then moved to acquire the remaining stock of Roko from Rodless, and did so pursuant to a written contract,[46] by which Rodless agreed to transfer the whole of its Roko stock to Dresser in exchange for shares of

43. R. 563, 564.

44. These figures are shown in Deft. Ex. 34 which is not included in the printed record but was before the Court of Appeals in a supplement to the printed record.

45. This contract of merger and related statements was Defendants' Ex. 34 which is not included in the printed record, see note 44.

46. R. 1223-1230.

Dresser stock. Thus Roko became the wholly owned subsidiary of Dresser, and Rodless was finally eliminated from any expectancy of participation in the future profits arising to the patent pool, except as its shareholders retained Dresser stock.

Dresser then caused the incorporation of a new corporate subsidiary which was given the name of Kobe, Inc., and into which was transferred all of the property and contracts which it had received from the former Kobe, Inc., together with all of the patents in the pool, which were assigned directly from Roko. Thus finally, all rights and benefits of the plans, contracts and rights of the hydraulic pump enterprise emerged in the petitioner Kobe, Inc. It retained and continued its exclusive possession of the market.

The consolidation into the petitioner Kobe, Inc., though recited above in separate steps, was coincident in point of time, and there was no interruption of the enterprise.[47] Coberly continued as president and directing head of the emerging corporation, the same manufacturing plants, resources, personnel, and products were continued in the new corporation, and the business enterprise continued without interruption under the same name and with the only change in the underlying ownership. Counsel for petitioners very properly admitted the single and continuous identity of the Kobe enterprise in his opening statement at the trial,[48] and the trial court found that the succession between the two Kobe corporations did not work an interruption or other change in the enterprise which was in effect a single continuous commercial project.[47].

47. Finding 34, R. 143; R. 167, 169.

48. R. 167.

The Intrusion of Respondents.

Kobe was in the full career of thirteen years of successful exclusive exploitation of the subject commercial field when the respondents, Dempsey Pump Company and Specialty Sales and Service, Inc., intruded upon the market in 1948. Dempsey was the manufacturer and Specialty was the sales agency of the venture. The Dempsey pump was an invention of Oscar E. Dempsey, and differed radically from the Kobe commercial product. It was introduced at the International Petroleum Exposition in Tulsa in May of 1948 and attracted immediate and wide interest among users of such equipment. Prior to its announcement to the trade, experimental installation of the Dempsey pump had been under close surveillance by Kobe's agents in the field, whose reports reflected increasing alarm at the evident success of the equipment.[49] Efforts were made by Kobe's agents to procure engineering details of the Dempsey pump, but were unsuccessful. When the new pump was exhibited at Tulsa, Coberly approached Dempsey and demanded, upon behalf of Kobe, that Dempsey withdraw from the market because his product infringed patents of the Kobe group. Dempsey replied that a patent search had been made and no infringement had been disclosed thereby. Coberly then declared to Dempsey that no one could make a satisfactory hydraulic pump without infringing one or another of the patents held in the Kobe pool.[50]

The new Dempsey enterprise was enthusiastically received by the trade, and great interest was shown by purchasers. Test installations by major operators were accepted in rapidly increasing numbers in the summer of 1948.

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49. Deft. Exhibit 26, R. 1187-1213; exhibit offered at R. 601, 602.

50. Dempsey, R. 595; Coberly, R. 232.

But Kobe was quick to take measures to discourage purchase of the Dempsey product. Its salesmen informed purchasing agencies of the major companies that Dempsey was an infringer and that his product doubtless would be "tested in court."[51] These representations were widespread and their effect was quickly felt by respondents' salesmen to whom they were reported. Within four months of announcement of the Dempsey product, Kobe filed an infringement suit at Tulsa wherein Dempsey was charged to infringe claims of five patents selected from the Kobe pool. Immediately following filing of the action Kobe published a letter addressed to some forty major operators in the area of Dempsey's operations advising them that the Dempsey pump was charged to infringe Kobe's patents and that suit had been brought against Dempsey.[52] These letters were addressed in nearly every instance to the purchasing agent of the company concerned, and the trial court found they were intended to forestall and prevent sales of the Dempsey product,[53] although no injunction for the purpose was obtainable upon the unused and unadjudicated patents involved. The letters and the oral disparagement of the Kobe salesmen had their intended effect, for the door of the market was literally slammed in the face of Dempsey and Specialty before they could even be heard upon the infringement charge. The salesmen of Specialty were confronted in every sales call with statements by purchasers that they could not negotiate further pending disposition of the infringement claim.[54] Companies which already had made installations of the Dempsey pump demanded and received

51. Finding 47, R. 148.

52. Finding 47, R. 148; R. 980-983.

53. Finding 47, R. 148, and Finding 54, R. 150.

54. R. 726-731, 769-770.

indemnity.[55] Other purchasers refused to pay for Dempsey pumps already installed until conclusion of the litigation.[56] The institution of the action, aided and furthered by the oral campaign of disparagement by Kobe salesmen and the written notice to the purchasing agents of large buyers, effectually and immediately shut down the Dempsey enterprise and kept it closed while the lawsuit pursued its weary and deliberate course. Great losses were sustained by Dempsey and Specialty in consequence of these acts, as both lower courts found.[57] They also found that the boycott by purchasers of the Dempsey product was the intended object of the letter and oral disparagements by Kobe.[58]

Not satisfied with its complaint of infringement, Kobe added a count for unfair competition[59] to its action against respondents in which it charged them with intentionally pirating Kobe personnel and Kobe's business secrets. This charge was wholly without probable cause, and failed utterly of proof at the trial, but it added substantially to the burden of the attack upon the respondents. It was rejected out of hand by the trial court.[60]

The lower courts had before them the detailed correspondence between Kobe employees respecting the intrusion of the Dempsey product and plans for its elimination. We shall not detail this evidence here but reference to its location in the record is found in the footnotes.[61] It was sufficient to persuade both lower courts that the concurrence of the infringement and unfair competition actions and the

55. R. 731, 1269.

56. R. 732.

57. Findings 48, 56, and 78; R. 148, 151, 157.

58. Finding 54, R. 150.

59. R. 28-31.

60. Finding 5, R. 134; Conclusion 8, R. 160.

61. Deft. Ex. 26, R. 1187-1213; offered, R. 604.

disparagements, both written and oral, which induced the customer boycott of the Dempsey product were pursuant to a deliberate plan to drive respondents from the competitive field, and to preserve the total monopoly of commerce which Kobe had maintained for fifteen years. The plan very nearly succeeded.

In the final event of the lawsuit, all but one of the Kobe patents were held to be invalid at law, and the one held valid and infringed expired before the case reached judgment in the trial court. Relief for the brief period of infringement of the valid patent was denied for abuse in violation of the antitrust laws, and petitioners were enjoined from further assertion of patents held in their pool. Damages were awarded to respondents upon a counterclaim for their losses sustained from the Kobe attack, which were principally commercial losses occasioned by the customer boycott, and the award was trebled under Section 4 of the Clayton Act.

The trial court entered 54 specific findings of fact on the monopoly issues of the case. By these findings petitioners were held to have plotted their ultimate complete monopoly from beginnings in 1933, and to have fashioned each step in their business career to its establishment, maintenance and perpetuation. They were held to have acquired and marshaled many patents with intent to use the same to prevent entry of competition to their product. Actual and potential competitors were absorbed or eliminated in the execution of their plan. The full force of their patent accumulations were focused upon respondents to drive them from the competitive field. Not content with expected judicial elimination of respondents, petitioners were found to have fomented and induced a customer boycott of respond-

ents' product which very nearly destroyed them, and which gave rise to the judgment in damages. The Court of Appeals affirmed the findings without exception.

The foregoing statement of the case is admittedly argumentative, and issue was drawn against many of the conclusions stated in the evidence at trial. But our statement is the aspect of the evidence which induced the findings, and is the condition of fact upon which the case was decided below. Unless this Court intends to try the facts again, it is apparent that the questions posed by the petition do not arise upon the record. We respectfully presume to restate them as they must be considered if the findings made and affirmed below are to be given effect.

Petitioners' Questions Restated.

Petitioners' first question, in view of the record, should be restated as follows:

1. Does the acquisition, pursuant to plan to monopolize an industry, of important patents in a field of commerce, including competitive and potentially competitive inventions, aided by restrictive contracts, and by envelopment of actual and potential competitors, coupled with the bringing of an infringement suit against the first intruding competitor, supplemented by the inducement of a customer boycott of the intruder's product, accompanied by misuse of the patents to control related commerce in unpatented goods and services, all resulting in the intended complete engrossment of a field of commerce, amount to a violation of Section 2 of the Sherman Act?

Petitioners' second question, again in view of the record, should be restated as follows:

2. When a monopolist, acting to protect further and maintain his monopoly, presses upon a competitor a legal action charging infringement of patents accumulated to

establish and further the monopoly, accompanied by inducement of a customer boycott of the competitor's product, and intends by such suit and boycott to drive the competitor from the competitive field, does the privilege of the policy of "free access" to the courts which protects maintenance of good faith litigation absolve the monopolist from consequences in damages under the Clayton Act for injuries inflicted by the concurring effect of the action and attendant boycott?

The questions really answer themselves in statement, and they are the questions which were decided adversely to petitioners by the two lower courts. If review is granted, they are the questions which will be presented for decision here.

Reasons for Refusing Review.

A comparison of the case as stated by petitioners with our statement of the issues, and with the statement contained in the opinion of the Court of Appeals, will indicate readily that the case turns chiefly upon issues of fact. We assume from *United States* v. *Oregon State Medical Society*, 343 U. S. 326, that the court does not desire to retry factual issues in connection with a petition for review. If this be the case, petitioners must bring the facts as they were found and affirmed below, and the questions presented upon the record are properly restated in terms of the considerations which induced the judgment attacked.

The best reason for refusal of review is that the judgment of the two lower courts correctly applies the law to the determined facts. A corollary consideration is that the existing law of the proper issues be plainly declared by paramount authority and be not generally misunderstood. Neither of these considerations implies necessity to review this case.

Patent Justification for Monopoly.

Petitioners' first "question" is a renewed effort to avoid the many rulings of this Court that the patent privilege may not be employed to subvert or avoid the penalties of the antitrust laws. We do not think that the law of this question is in anywise obscure.

The insufficiency of "mere accumulation" has been pointed out in *Automatic Radio Co.* v. *Hazeltine,* 339 U. S. 827, as petitioners observe. However, this Court has carefully warned from very early date, that the patent privilege confers no immunity from the penalties of the Sherman and Clayton Acts where patents are utilized in furtherance of the activities or results condemned by these laws. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, sounded the first warning in this respect. *Standard Oil Co.* v. *United States,* 283 U. S. 163, followed with a plain declaration that the limited monopolies granted to patent owners carried no exemption from the antitrust laws. Among many later applications of the rule, perhaps *Hartford Empire Co.* v. *United States,* 323 U. S. 386, best exemplifies its application to a factual situation wherein patents were employed to regiment, dominate and monopolize an industry. *Transparent-Wrap Machine Corp.* v. *Stokes and Smith Co.,* 329 U. S. 637, together with a number of similar decisions noted specific misuses of patents which violated the antitrust laws, including their employment to capture commerce in related unpatented goods. The evil of patent pooling in connection with a plan to restrain commerce, and the insufficiency of the patent privilege to justify the violation was noted and reiterated as recently as *United States* v. *New Wrinkle, Inc.,* (1952) 342 U. S. 371.

The Court of Appeals thought the question controlled

by *Hartford Empire Co.* v. *United States,* 323 U. S. 386, and by *United States* v. *Line Material Co.,* 333 U. S. 287 (R. 1327), and so do we.

In view of the findings of fact made in the case, we do not believe the opinion of this Court upon the issues is required to make clear the application of its many precedents. We think the judgments below have done so, and that further delineation of the authorities which bear upon offenses like to those of petitioners is unnecessary to the law.

The "Free Access" Question.

Petitioners' second contention is simply that because they employed the arm of the court, through an infringement action and an action for unfair competition, as a part of their attack upon respondents they are immune from damages by reason of the rule of public policy which extends privilege to good faith litigation of honestly disputed legal issues. Again the question urged does not fit the facts, for the legal action was but a part of a larger and overriding plan and operation to eliminate and destroy respondents before their entry into competition could become effective. While the trial court found that petitioners believed they would prevail upon their counts of infringement, the court also found that the action was maintained for the overriding purpose of preserving and insuring petitioners' solitary engrossment of the commerce involved. The action for unfair competition was wholly without probable cause, and cannot by any standard be judged to have been brought in good faith. Remember also that petitioners were not content to await judicial determination of their right or want of right in the premises. The customer boycott which was induced by the acts of Kobe was coincident with the action, and was calculated to achieve a destructive end before

judgment could be reached in the legal action. These were not isolated acts, but were a concert of action which was found to be the culmination of a long standing plan to forestall entry of competition in the pre-empted field.

In view of the facts, the legal question is not difficult, nor was the Court of Appeals without controlling precedent. Both lower courts thought the question was controlled by *Aikens* v. *Wisconsin,* 195 U. S. 194; *Swift & Co.* v. *United States,* 196 U. S. 375, and *American Tobacco Co.* v. *United States,* 328 U. S. 781, (R. 1331) wherein it is held that innocent and otherwise protected constituent acts when employed as the means to accomplish or further a prohibited end obtain the malevolent character of the prohibited whole, and are actionable notwithstanding privilege which might otherwise exist.

At page 1331 of the printed record, the Court of Appeals acknowledges petitioners' premise here. It is stated that if there were nothing more than the bringing of the infringement action to cause respondents' injuries, damages could not be recovered, but pointed out that this was not the case. At page 1332 of the printed record the court notes that to hold there was no liability for damages in this case would be to hold that a monopolist could smother every potential competitor with litigation and leave the competitor without his remedy. Obviously the arm of the courts of the United States may not be bent to the frustration of its own law, and certainly the mere inclusion of a legal action in concert with other non-privileged acts cannot imply immunity to their joint consequence.

Petitioners make much of the opinion of the Second Circuit Court of Appeals in *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791. Decided in 1924 by a divided court, it appears that review of this opinion by this Court was not

sought. It is suggested that the opinion of the Court of Appeals in this case renders circuits in conflict upon the damage question. We doubt that this results, or that the *Straus* case is any longer regarded as authoritative. The effect of the decision was to deny, in a similar case, recovery of attorneys' fees expended in the defense of the wrongful infringement action by a monopolist, but the commercial damages sustained as a result of a boycott similarly induced were sustained. A vigorous dissent in the case will appeal to the Court as resting upon the proper ground. We have been unable to find an instance in which the authority has been followed by another court upon the point raised here, and we do not believe that it is the source of substantial confusion in view of the plain pronouncements of this Court cited above and accepted as controlling by the Court of Appeals.

Conclusion.

We respectfully submit that review of the judgment in this case will result only in reiteration by this Court of the opinion of the Court of Appeals and that no consideration of general public concern or policy demands the review prayed for. We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 270.

KOBE, INC.,
a corporation,
and
ALTA VISTA HYDRAULIC COMPANY,
a corporation,
Petitioners,

vs.

DEMPSEY PUMP COMPANY,
a corporation,
OSCAR E. DEMPSEY,
SPECIALTY SALES & SERVICE, INC.,
a corporation,
and
M. L. WALRAVEN, JR.,
Respondents.

REPLY BRIEF OF PETITIONER.

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